IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-192

NEW YORK GASLIGHT CLUB, INC., and JOHN ANDERSON, Manager of the New York Gaslight Club, Inc.,

Petitioners,

VS.

MS. CIDNI CAREY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

Opinions Below

The Memorandum Decision of the United States District Court for the Southern District of New York, dated September 15, 1978, is reported at 458 F.Supp 79 (Appendix at pages A24-A28). The divided decision of the United States Court of Appeals for the Second Circuit, dated May 8, 1979, is reported at 598 F.2d 1253 (Appendix at pages A1-A23).

Additional Statutory Provisions

The discussion of the issues herein involves reference to Title XI of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 268, 42 U.S.C. Section 2000h-4, which provides:

> "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."

To the extent that the Petitioners make reference to Section 297 (4)(a) of the Executive Law of the State of New York and set forth its provisions by erroneously quoting it as follows:

> "The case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his attorney. With the consent of the division, the case in support of the *complaint* may be presented solely by his attorney." (Emphasis added)

the provision should read:

> "With the consent of the division, the case in support of the *complainant* may be presented solely by his attorney." (Emphasis added).

The inaccuracy is repeated at page 7 of the Petitioners' Brief.

Counterstatement of the Question Presented

Whether, as the majority of the Court of Appeals below held, the Respondent, an aggrieved civil rights Plaintiff, is entitled to recover attorney's fees under Section 706 (k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5(k), for her successful prosecution of an employment discrimination matter in a state administrative proceeding pursuant to a deferral to said agency, by the Equal Employment Opportunity Commission, under Section 2000e-5(c) of Title VII of the Civil Rights Act of 1964.[1]

Counterstatement of Case

On or about August 27, 1974, the Respondent (Plaintiff-Appellant below), a Black American citizen, sought a waitress position with the Petitioner New York Gaslight Club, Inc. (Defendant-Appellee below). After an audition and an interview, the Respondent was advised that there was no position available.[2]

Believing that she was denied a position as a waitress with the Petitioner Gaslight Club, Inc., because of her race,

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[1] The Circuit Court below posed the question in this form:

> "The issue in this case . . . is whether the general policy of awarding attorney's fees to successful plaintiffs in Title VII actions envisions an award to a party who is successful in pursuing her claim before the state human rights agency without having to pursue her case in federal court. . . . The question is whether §706 (k) encompasses fee awards to complaining parties who succeed at a step in the statutory scheme before they are forced to litigate their claims in federal court." Appendix at page A6.

[2] See: Appendix at pages A64-A72 (setting forth Order, Findings and Decision of New York State Division of Human Rights). See also: Appendix B herein (with relevant attachments) at pages b1-b18.

the Respondent filed a complaint, through her attorneys, with the New York District Office of Equal Employment Opportunity Commission (EEOC) on or about January 9, 1975. Appendix A herein at pages a1-a3.

On January 24, 1975, the EEOC advised the Respondent's attorney that a complaint had been received by the office and accepted. Appendix B herein at page b9.

On January 28, 1975, the New York State Division of Human Rights advised the Respondent that, pursuant to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e-5(c)), her complaint to the EEOC had been deferred to it. The Division directed the Respondent to file a complaint with its office within sixty (60) days. Appendix B herein at page b10.

On February 21, 1975, the Respondent filed a verified Complaint, virtually identical to her EEOC Complaint, with the New York State Division of Human Rights (Appendix at pages A62-A63) charging the Petitioners and Ray Angelic[3] with discriminating against her by refusing to hire her because of her race.

After investigation, at which the Respondent was represented by counsel, the New York State Division of Human Rights found probable cause to believe that the Petitioners had engaged in an unlawful discriminatory practice.

Conciliation efforts failed and the case was recommended for public hearing pursuant to the Rules and Regulations of the New York State Division of Human Rights (9 N.Y. C.R.R. Section 465.11).

[3] Ray Angelic was a management employee of the Petitioner Gaslight Club. Unlike Petitioner Anderson, Manager of the New York Gaslight Club, he was not held responsible for any unlawful discriminatory act against the Respondent.

On May 20, 1975, Respondent's counsel wrote to the EEOC, advising it that the Respondent was proceeding ahead in the State Division of Human Rights, per its deferral to said State agency, and inquiring of the status of the matter before the EEOC. Appendix B herein at page b11.

On May 22, 1975, the EEOC responded to the foregoing letter and indicated that, as soon as it was possible, an investigator would be assigned to the Respondent's matter and that she would receive further advisement. Appendix B herein at page b12.

The matter came on for hearing before the New York State Division of Human Rights with James I. Meyerson, and George E. Hairston appearing for the Respondent and Albert Proujansky appearing for the Petitioners. There was no attorney from the New York State Division of Human Rights at the Division proceedings which were held on two separate days.

On August 13, 1976, the New York State Division of Human Rights issued an Order after Hearing holding that the Petitioners had discriminated against the Respondent because of her race in violation of the Human Rights Law of the State of New York, Article 15 of the Executive Law, 18 McKinney's Sections 290 *et seq.*, although it concluded that Ray Angelic had not discriminated against the Respondent and dismissed the Complaint as to him. Appendix at pages A64-A72.

The Petitioners were directed to offer to the Respondent a position as a waitress and to pay to her a sum of money as a back pay award. No attorney's fee was awarded.[4]

[4] The Human Rights Law of the State of New York does not provide for attorney's fees; and such fees have not been authorized. See: *State Division of Human Rights* v. *Gorton*, 302 N.Y.S. 2d 966, 32 A.D. 2d 933 (2nd Dept. 1969); *State Division of Human Rights* v. *Speer*, 313 N.Y.S. 2d 28, 35 A.D. 2d 107 (2nd Dept. 1970), *reversed on other grounds*, 324 N.Y.S. 2d 247, 29 N.Y. 2d 555 (1971).

On or about August 20, 1976, the Petitioners filed a Notice of Appeal from the aforementioned decision and Order (pursuant to Section 297-a of the Executive Law) to the New York State Human Rights Appeal Board, an agency independent of the New York State Division of Human Rights; and they secured a stay postponing implementation of the relief pending the outcome of the appeal therein.

On December 20, 1976, the Respondent and the Petitioners' counsel received notice from the EEOC advising them that, after examination of the record and proceeedings before and in the New York State Division of Human Rights, it had been determined that there was reasonable cause to believe that the Petitioners had engaged in an unlawful discriminatory practice in violation of Title VII of the Civil Rights Act of 1964. Appendix A herein at pages a4-a6.

At the same time the EEOC inquired as to whether the parties would be willing to conciliate the matter informally, with the assistance of that Agency; and, on or about December 29, 1976, the Respondent responded affirmatively. Appendix A herein at page a7.

On August 26, 1977, the New York State Human Rights Appeal Board affirmed the findings and determination of the Commissioner of the New York State Division of Human Rights.

Thereafter, the Petitioners appealed to the New York Supreme Court/Appellate Division—First Judicial Department and obtained a stay postponing implementation of the relief pending resolution of the appeal.

On November 3, 1977, the administrative determinations were unanimously affirmed. *New York Gaslight Club* v.

State Division of Human Rights on the Complaint of Carey, 59 A.D. 2d 852 (1st Dept. 1977). Appendix B herein at pages b14-b16.

A subsequent Motion for reargument or in the alternative for leave to appeal to the New York State Court of Appeals was denied. Appendix B herein at page b17. Thereafter the Court of Appeals of the State of New York denied the Petitioners leave to appeal thereto. *New York Gaslight Club, supra* at 43 N.Y. 2d 951 (1978). Appendix B herein at page b18.

On July 13, 1977, before the decision of the Appeal Board was received, the Respondent received a letter from the EEOC notifying her that it had decided not to litigate her matter and enclosing therein a Notice of Right to Sue.

Thereafter and within the mandated ninety (90) day period, the Respondent filed a federal action, pursuant to both Title VII of the Civil Rights Act of 1964, as amended, and the Civil Rights Act of 1866, 42 U.S.C. Section 1981 (Appendix at pages A19-A34), and the Petitioners answered the same denying virtually all of the allegations set forth in the Complaint (Appendix D herein at pages d1-d2).

While this matter was still pending in the New York State Courts (upon appeal thereto by the Petitioners from the administrative determinations adverse to their interest), the District Court convened a status conference at which the Respondent indicated that the only issue which she anticipated litigating therein was the issue of whether she should be awarded fees for the success in the State Division of Human Rights (anticipating that said success would maintain in the New York Courts despite the efforts of the Petitioners to reverse it) pursuant to the Title VII provisions authorizing fees thereunder. Appendix at pages A73-A79.

When the Respondent's success in the New York State Division of Human Rights was upheld by the New York Court, the only issue submitted to the District Court was whether the Respondent was entitled to attorney's fees. The Petitioners agreed to the same and did not request a de novo hearing, to which they were entitled on the issue of liability (under Title VII), apparently conceding the same at that point and notwithstanding their previous denial.

On September 21, 1978, the District Court issued a decision (458 F.Supp. 79 (S.D.N.Y. 1978)), denying Respondent attorney's fees under Title VII for the successful efforts in the State Division of Human Rights.

On September 30, 1979 Respondent filed a timely Motion seeking modification of the Memorandum Decision and leave to supplement the record. The Petitioners filed papers in opposition to said Motion.

In addition, Adele Graham, Esq., an attorney for the New York State Division of Human Rights, filed an affidavit in support of the Respondent's application, seeking to clarify the role of a Division attorney in the Division process. Appendix at pages A58-A61.

In her Affidavit, Ms. Graham set forth the policy, practice and role of the Division attorney within the State administrative proceedings and noted, categorically, that the Division encouraged complainants to obtain private counsel for the purpose of prosecuting their respective complaints in the State Division. In addition, Ms. Graham noted that, because the Respondent had obtained private counsel, the Division attorney did not participate in the administrative process. Finally, Ms. Graham noted that, whenever a Division attorney participates in the administrative proceedings and otherwise, the attorney acts for the Division, on behalf of complaint, and not for the Complainant. Appendix at pages A59-A60.

On November 3, 1978, the District Court filed an Order, with notation, denying the Respondent's Motion.

Believing that the District Court below was in error, both in its initial decision and in its subsequent failure to modify the same, the Respondent appealed to the United States Court of Appeals for the Second Circuit.

On May 8, 1979, the United States Court of Appeals for the Second Circuit reversed the decision and order of the District Court and remanded the matter for consideration of an award of counsel fees (with Senior Circuit Judge Smith writing the majority opinion, in which Circuit Judge Mansfield joined and from which Circuit Judge Mulligan dissented), 598 F.2d 1253 (2nd Cir. 1979).

Summary of the Argument

I.

Deference to a state forum is an integral part of the enforcement scheme of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000(e) *et seq.*).

The purpose of the enactment of Title VII was to ". . . assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin." *Alexander* v. *Gardner-Denver Company,* 415 U.S. 36, 44, 94 S. Ct. 1011, 39 L. Ed. 2d 147, 155 (1974).

Congress created a comprehensive procedure involving both "state and local equal employment opportunity agencies as well as the Equal Employment Opportunity Com-

mission", *Alexander* v. *Gardner-Denver Company, supra* at 415 U.S. 44, to secure compliance with the Act and accomplish the goals manifested therein.

In substance, the state proceeding herein was an extension of the federal proceeding and was envisioned by Congress to be a part of the federal statutory scheme encompassed within and under Title VII of the Civil Rights Act of 1964.

II.

The provisions in Title VII and the interpretations of it by this Court make it clear that the relationship between the state and federal forums is "complementary", *Alexander* v. *Gardner-Denver Company, supra* at 415 U.S. 50, since the inter-related and primary consideration is the enforcement of the national policy to eliminate discrimination in employment.

Where the state remedy proves to be inadequate in the enforcement of the Congressional policy to eliminate employment discrimination, the statutory scheme contemplates resort to federal remedy, independent of the state remedy, to facilitate cumulative and comprehensive relief for the wrong committed.

The doctrine of preemption is of limited relevance in the present context, *New York Telephone Company* v. *New York Labor Department,* 440 U.S. 519, 527, 99 S. Ct. 1328, 59 L. Ed. 2d 553 (1979), if it is relevant at all. To the extent that it is relevant, the principles enunciated by this Court in those cases which address the doctrine reinforce the proposition that the supplementary action taken by the federal court, in awarding fees, was proper and correct and otherwise consistent with said doctrine. In addition, Title XI of the Civil Rights Act of 1964, 42 U.S.C.

2000h-4, supports the decision of the Circuit Court below, under the theory and doctrine of preemption, assuming its limited relevance in this context.

III.

The award of attorney's fees is appropriate and necessary as part of the comprehensive relief envisioned by Title VII, as redress for a wrong under the Act, "in all but special circumstances." *Christiansburg Garment Co.* v. *EEOC,* 434 U.S. 412, 417, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978); *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 415, 98 S. Ct. 2362, 445 L. Ed. 2d 280 (1975).

As a prevailing party in an enforcement proceeding recognized as an integral part of Title VII enforcement, the Respondent is entitled to the award of fees which, themselves, are designed to further the purpose of the Act.

IV.

Viewing the emphasis of the inter-relatedness between administrative and judicial mechanisms, as well as state and federal forums, for effecting the purposes of Title VII of the Civil Rights Act of 1964, the Respondent is entitled to recover fees for her successful state administrative efforts, upon deferral thereto by the federal administrative agency charged with enforcing Title VII (pursuant to mandate thereunder), through resort to a federal court which has ultimate responsibility for enforcing Title VII and carrying out the Congressional policy encompassed therein.

V.

The efforts of the public interest attorneys representing the complainant in the New York State Division of Human

Rights, upon deferral thereto by the Equal Employment Opportunity Commission (after the Respondent, with the assistance of her public interest attorneys filed a complaint with the EEOC), were necessary and resulted in the enforcement of the policy adopted by Congress in Title VII of the Civil Rights Act of 1964.

Respondent's attorneys carried the entire burden during the state Division proceedings and prior thereto and were responsible for making the record and submitting the post trial arguments upon which a favorable decision was based.

The attorney for the New York State Division of Human Rights does not represent the complainant but rather the interest of the Division in the complaint; and, accordingly, the fiduciary between the Division attorney and a complainant is much more limited than the fiduciary between the complainant and a privately retained counsel or a public interest attorney.

ARGUMENT

An Aggrieved Civil Rights Plaintiff Is Entitled to Recover Attorney's fees, Under Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5(k), for the Successful Prosecution of an Employment Discrimination Matter in a State Administrative Proceeding Pursuant to a Deferral to Said Agency, by the Equal Employment Opportunity Commission, Under Section 2000e-5(c) of Title VII of the Civil Rights Act of 1964.

I. Deference to a State Forum Is an Integral Part of the Enforcement Scheme of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000(e) *et seq.*).

To the end that Title VII of the Civil Rights Act of 1964 was enacted ". . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin", *Alexander* v. *Gardner-Denver Company,* 415 U.S. 36, 44, 94 S.Ct. 1011, 39 L.Ed. 2d 147, 155 (1974), citing *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 800, 93 S.Ct. 1817, 3 L.Ed. 2d 668 (1973) and *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 429-430, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971), Congress created a comprehensive procedure involving both "state and local equal employment opportunity agencies as well as the Equal Employment Opportunity Commission", *Alexander* v. *Gardner-Denver Company, supra* at 415 U.S. at 44, to secure compliance with the Act.

That the state proceeding is part and parcel of the entire Title VII procedure is beyond question. See: *Harris* v. *Commonwealth of Pennsylvania,* 419 F.Supp. 10, 13 (M.D. Pa. 1976); *Plummer* v. *Chicago Journeyman Plumb-*

ers, etc., 452 F.Supp. 1127, 1136 (N.D. Ill. 1978); *Flesch* v. *Eastern Pennsylvania Psychiatric Institute,* 434 F.Supp. 963, 969 at footnote 3 (E.D. Pa. 1977); *Bell* v. *Wyeth Laboratories, Inc.,* 448 F.Supp. 133, 136 (E.D. Pa. 1978); *Equal Employment Opportunity Commission* v. *Delaware Trust Co.,* 416 F.Supp. 1040, 1044 (D. Del. 1976); *Presseisen* v. *Swarthmore College,* 386 F.Supp. 1337, 1340 (E.D. Pa. 1974); *Black Musicians of Pittsburgh* v. *Musicians Local 60-471,* 375 F.Supp. 902, 908-909 (W.D.Pa. 1974), *affirmed without opinion* 544 F.2d 512 (3rd Cir. 1976); *Equal Employment Opportunity Commission* v. *Wah Chang Albany Corp.,* 499 F.2d 187, 189 (9th Cir. 1974).[5]

The Respondent herein initially filed a formal complaint with the EEOC challenging the Petitioners conduct under Titile VII of Civil Rights Act of 1964. Upon receipt of the same, the EEOC deferred the matter to the New York State Division of Human Rights, as it was required to do pursuant to Section 2000e-5(c) of Title VII of the Civil Rights Act of 1964, holding it in "suspended animation"

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[5] The Circuit Court below wrote in this regard:

"Deference to State mechanisms for resolving discrimination complaints is an integral part of the enforcement process under Title VII, 42 U.S.C. §2000e-5(c), and submission to state remedies is a jurisdictional prerequisite to EEOC action. See Equal Employment Opportunity Commission v. Union Bank, 408 F.2d 867, 869 (9th Cir. 1968). The statutory framework of Title VII embodies a 'federal mandate of accommodation to state action.' Voutsis v. Union Carbide Corp., 452 F.2d 889, 892 (2nd Cir. 1971), cert. denied, 406 U.S. 918 (1972).

* * *

Thus, state human rights agencies play an important role in the enforcement process of Title VII, since they afford a chance to resolve a discrimination complaint in accordance with federal policy before such a complaint reaches the federal courts." Appendix at pages A6-A8.

See also: *Alexander* v. *Gardner-Denver Co., supra* at 415 U.S. 44.

pending the outcome of the state proceeding.[6] *Love* v. *Pullman Co.,* 404 U.S. 522, 526, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972). The deferral was mandatory and not optional. See: *Oscar Mayer & Co.* v. *Evans,* —— U.S. ——, 99 S.Ct. 2066, 60 L.Ed. 2d 609, 615-616, footnote 3 (1979).

In substance, the state proceeding herein was an extension of the federal proceeding and was envisioned by Congress to be a part of the federal statutory scheme encompassed within and under Title VII of the Civil Rights Act of 1964.

II. Because of the Inter-Related and Complementary Nature of the State/Federal Title VII Enforcement Mechanism, Title VII Authorizes Resort to a Federal Court Where the State Forum Does Not Provide Full and Complete Relief.

The provisions in Title VII and the interpretations of it by this Court make clear that the relationship between the state and federal forums is "complementary", *Alexander* v. *Gardner-Denver Company, supra* at 415 U.S. 50, since their inter-related and primary consideration is the enforcement of the national policy to eliminate discrimination in employment.

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[6] In an amicus brief submitted to the Circuit Court below by the New York State Division of Human Rights (Appendix C herein), it was acknowledged that a "work sharing" agreement existed between the Division and the EEOC. Addressing the purpose and intention of the 1978 Agreement between said agencies, the Division noted that:

"... the 1978 Worksharing Agreement (Ex. B) 'in recognition of the common jurisdiction and goals, was intended to integrate the charge processing procedures and reduce duplication of effort by sharing primary responsibility' (Ex. B p. 2)" Appendix C herein at page c8.

Reference is made to a similar statement of purpose and intention incorporated into a 1976 Agreement and quoted therefrom by the Division in its amicus brief. Appendix C at pages c8-c9. See also: *Bucyrus-Erie Co.* v. *Department of Industry, Labor, etc.,* 599 F.2d 205, 212, footnote 12 (7th Cir. 1979), *appeal pending* 48 U.S.L.W. 3181 (August 16, 1979).

There can be little doubt that the federal scheme embodied in the laws, rules, and regulations of Title VII "contemplates and encourages enforcement of state fair employment statutes as an integral component of the federal statutory framework," *Bucyrus-Erie Co.* v. *Department of Industry Labor, etc., supra* at 599 F.2d, 211. Consistent with that view, "the legislative history of Title VII . . . emphasized the coordination with and utilization of state fair employment laws." *Bucyrus-Erie Co.* v. *Department of Industry, Labor, etc., supra* at 599 F.2d 211.

However, while Congress may have intended through Section 2000e-5(c) "to screen from the federal court those problems of civil rights that could be settled to the satisfaction of the grievant in 'a voluntary and localized manner', See 110 Cong. Record 12725 (June 4, 1964) (remarks of Sen. Humphrey)", *Oscar Mayer & Co.* v. *Evans, supra* at 60 L.Ed. 2d 609, the purposes underlying the enactment of Title VII were clearly based on the congressional recognition that ". . . 'state and local FEPC laws vary widely in effectiveness. . .'", *Voutsis* v *Union Carbide Corporation,* 452 F.2d 889, 894 (2nd Cir. 1971), *cert. denied* 406 U.S. 918, 92 S.Ct. 1768, 32 L.Ed. 2d 117 (1972), cited by this Court in *Oscar Mayer & Co., supra* at 60 L.Ed. 2d 615, 619.

Since Title VII is "a remedial statute to be liberally construed in favor of victims of discrimination", *Mahroom* v. *Hook*, 563 F.2d 1369, 1375 (9th Cir. 1977), *cert. denied* 436 U.S. 904, 98 S.Ct. 2234, 56 L.Ed. 2d 402 (1978),[7] where

[7] See also: *EEOC* v. *Wah Chag Albany Corp., supra* at 499 F.2d 189; *Davis* v. *Valley Distributing Co.,* 522 F.2d 827, 832 (9th Cir. 1975), *cert. denied* 429 U.S. 1090, 97 S.Ct. 1099, 51 L.Ed. 2d 535 (1977); *Gill* v. *Monroe County Dept. of Social Services,* 79 F.R.D. 316, 333 (W.D.N.Y. 1978); *Ramirez* v. *National Distillers and Chemical Corp.,* 586 F.2d 1315, 1321 (9th Cir. 1978).

the state remedy proves to be inadequate in the enforcement of the Congressional policy to eliminate employment discrimination, the statutory scheme contemplates ultimate resort to the federal remedy, independent of the state remedy, to facilitate cumulative and comprehensive relief for the wrong committed. *Voutsis* v. *Union Carbide Corporation, supra* at 452 F.2d 893. See also: *White* v. *Dallas Independent School District*, 581 F.2d 556, 561 (5th Cir. 1978) (en banc).

There is little doubt that "the system of remedies is a complementary one, with the federal remedy designed to be available after the state remedy has been tried" without producing full and complete results. *Voutsis* v. *Union Carbide Corporation, supra* at 452 F.2d 894. That is, as this Court clearly held:

> "The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander* v. *Gardner-Denver Co., supra* at 415 U.S. 48-49.

In other words, "Congress did not intend to foreclose federal relief simply because state relief was . . . foreclosed", *Oscar Mayer & Co.* v. *Evans, supra* at 60 L.Ed. 2d 619, citing the remarks of Senator Humphrey to the Senate where he noted that "where States are unable . . . to provide . . . protection, the federal Government must have the authority to act."

Ultimately, as this Court recognized, responsibility for the enforcement of Title VII rests with federal courts. Under the Act, those courts are authorized "to order such affirmative relief as may be appropriate to remedy the effects of unlawful employment practices" and "to secure

compliance with Title VII", *Alexander* v. *Gardner-Denver Company, supra* at 415 U.S. 44-45,[8] even where the EEOC has found that there is no cause to believe that Title VII has been violated. See: *McDonnell Douglas Corp.* v. *Green, supra* at 411 U.S. 798-799.

Inasmuch as the state forum herein did not provide the Respondent with the full and complete relief envisioned by Congress as a "comprehensive solution for the problem of invidious discrimination in employment", *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459, 95 S.Ct. 1716, 44 L.Ed. 2d 295, 301 (1975), she was entitled to resort to the federal court in order to secure full relief under Title VII. The legislative history of Title VII manifests a congressional intent to allow an individual to pursue his rights in a federal forum, under the Act, independent of and subsequent to actions in a state forum. See: *Johnson* v. *Railway Express Agency, supra* at 421 U.S. 459, citing *Alexander* v. *Gardner-Denver Co., supra* at 415 U.S. 48.

There is no reason to deviate from the principle that "courts confronted with procedural ambiguities in the statutory framework have with virtual unanimity resolved them in favor of the complaining party", *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 461 (5th Cir. 1970), cited with approval in *Davis* v. *Valley Distributing Company, supra* at 522 F.2d 832, when the complaining party, as here, has been denied the full and complete relief clearly intended by Congress under Title VII because of a deficiency in the remedy provided by a deferral state agency.

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[8] See also: *Al-Hamdani* v. *State University of New York*, 438 F.Supp. 299, 302 (W.D.N.Y. 1977); *EEOC* v. *General Telephone of the Northwest, Inc.*, 599 F.2d 322, 326, footnote 2 (9th Cir. 1979); *Dickinson* v. *Chrysler Corp.*, 456 F.Supp. 43, 45-48 (E.D. Mich. 1978)

The reason an interested state refuses to act, upon deferral under the Act, is immaterial. The federal purpose is met by the deferral, itself, and subsequent resort to the federal forum is specifically contemplated. See: *Pacific Maritime Association* v. *Quinn*, 465 F.2d 108, 110 (9th Cir. 1972), cited in *Davis* v. *Valley Distributing Company, supra* at 522 F.2d 831-832, footnote 12 and *Oscar Mayer & Co.* v. *Evans, supra* at 60 L.Ed. 2d 619. See also: Remarks of Senator Humphrey addressing the limitations of federal deference:

> "(A)t the same time we recognized the absolute necessity of providing the Federal Government with authority to act in instances where States and localities did not choose to exercise these opportunities to solve the problems of civil rights in a voluntary and localized manner * * *. In instances where States are *unable* or unwilling to provide this protection, the Federal Government must have the authority to act." (Emphasis added). 110 Cong. Record 12725 (June 4, 1964).

"The heart of the deferral requirement is that the state must prohibit the act of discrimination complained of", *White* v. *Dallas Independent School District, supra* at 581 F.2d 560, and nothing more. Deferral cannot be avoided merely because the State does not provide all of the remedies available under Title VII. See: *Crosslin* v. *Mountain States Telephone and Telegraph Co.*, 422 F.2d 1028, 1031 (9th Cir. 1970), *cert. granted, opinion vacated and remanded for further consideration*, 400 U.S. 1004, 91 S.Ct. 562, 27 L.Ed. 2d 618 (1971); *White* v. *Dallas Independent School District, supra* at 581 F.2d 560; *Bauman* v. *Union Oil Company*, 400 F.Supp. 1021, 1025 (N.D. Cal. 1973). Deferral is defined "only in terms of time", *Crosslin, supra* at 422 F.2d 1031, and the requirement "that the

state must prohibit the act of discrimination complained of." *Nueces County Hospital District* v. *EEOC,* 518 F.2d 895 (5th Cir. 1975).

In fact there is authority that, once having commenced the state process, an aggrieved party is foreclosed from prematurely seeking relief in a federal court until completion of the state efforts (even though the individual has not voluntarily elected to seek redress in the state forum but is mandatorily referred thereto by the federal agency to which the individual elected to seek recourse initially). See: *Rios* v. *Enterprise Association Steamfitters Local Union No. 638 of U.A.,* 326 F.Supp. 198, 203-204 and cases cited therein (S.D.N.Y. 1971), *affirmed* 501 F. 2d 622 (2nd Cir. 1972).

Since the purpose of Title VII, however, is remedial in nature, providing extensive and comprehensive relief for the victim of the prohibited act of discrimination, it would be contrary to the intent of the Act to foreclose an individual who prevailed in a state forum, upon deferral thereto, from resort to a federal court in order to secure relief permitted under Title VII but not otherwise provided for under the State law. For, in light of "the unusual statutory scheme of Title VII", *Gavin* v. *Peoples Natural Gas Co.,* 464 F.Supp. 622, 626 (W.D. Pa. 1979), it is doubtful that Congress intended a "scheme wherein the EEOC could process a claim which the state had dismissed but that the federal court would be barred by the state's action." *Gavin* v. *Peoples Natural Gas Co., supra* at 464 F.Supp. 625. In short, ". . . Section 706(c) was never intended to create absolute deference to states." *Karan* v. *Nabisco, Inc.,* 78 F.R.D. 388, 401 (W.D. Pa. 1978).

There can be no doubt, therefore, that, to the extent that the state fair employment mechanisms do not provide for the comprehensive relief specifically set forth in the Title

VII legislation, there is a clear intent that federal law would supplement the state proceeding to give full and complete meaning to the Act. Even the Petitioners themselves concede that "the federal mechanism is . . . to be brought into play if the state mechanism fails to function." Petitioner's Brief at page 9.

Thus, the deferral requirement of Title VII is designed to "encourage comity", *Gavin* v. *Peoples Natural Gas Co., supra* at 464 F.Supp. 625, and to give the state first opportunity, but not the sole and exclusive opportunity, to provide a remedy for a discriminatory employment practice. Where, as here, the relief in the first instance is incomplete, it is incumbent upon a federal court to provide the plaintiff with an opportunity to secure the more all encompassing and comprehensive relief envisioned by the Congress when it enacted Title VII. See: *Dickinson* v. *Chrysler Corp., supra* at 456 F.Supp. 45-48.

To the extent that the state has proscribed procedural mechanisms for addressing a matter, upon deferral, such procedural mechanisms are not at all sacrificed because they have been supplemented by substantive comprehensive relief.

Thus, the award of fees, as a substantive matter, is not inconsistent or in conflict whatsoever with what the state does in the context of its own limitations, legislatively or otherwise. It merely supplements that which is not available under state law to remedy a condition found by Congress to be violative of public policy and law.

It is submitted that much of the doctrine of preemption is, as in *New York Telephone Company* v. *New York Labor Department,* 440 U.S. 519, 527, 99 S.Ct. 1328, 59 L.Ed. 2d 553 (1979), ". . . of limited relevance in the present context"; and, accordingly, the effect of the Petitioners to cast

the issue within the preemption doctrine is substantially misplaced.

Petitioners' reliance upon *State of Florida* v. *United States,* 282 U.S. 194, 51 S.Ct. 119, 75 L.Ed. 291 (1931) and *Florida Lime and Avocado Growers* v. *Paul,* 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed. 2d 248 (1963), in the context of the issues raised in this case, is without cause. Both *State of Florida* and *Florida Avocado Growers* address the issue of the regulation of commerce among and between the states and the effect thereof on the states' regulation of commerce within their own respective boundaries.

Those cases are thereby significantly dissimilar from the situation at hand. To the extent, however, that pronouncements set forth in those cases are applicable herein, they tend to reinforce the proposition advanced by the Respondent.[9]

The "proper application of the [preemption] doctrine must give effect to the intent of Congress", *Malone* v. *White Motor Co.,* 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed. 2d 443 (1978), for "the purpose of Congress is the ultimate touchstone." *Retail Clerks* v. *Schermerhorn,* 374 U.S. 90, 103, 84 S.Ct. 219, 11 L.Ed. 2d 179 (1963). In the context of the issue raised in this case, it is clear, from statutory language and Court pronouncements, that federal law is to be accorded paramount consideration when providing relief to a person wronged under Title VII.

[9] The same is true, as well, with respect to *Schwartz* v. *State of Texas,* 344 U.S. 199, 73 S.Ct. 232, 97 L.Ed. 231 (1952) which is cited by the Petitioners to advance their position and which addressed the "application of a federal statute to state proceedings." *Schwartz* v. *State of Texas, supra* at 344 U.S. 201. The question raised in that case was whether communications barred from use as evidence in a federal criminal prosecution could be introduced as evidence in a state proceeding. This Court held that they could, finding that it did not believe "that Congress intended to impose a rule of evidence on the state court." *Schwartz* v. *State of Texas, supra* at 344 U.S. 203. In the instant case, there is no indication that Congress has preempted the state proceeding whatsoever and imposed any substantive, evidential, or procedural requirement on the state forum. Rather, there is every indication that Congress sought to provide the federal forum to an aggrieved party where the state forum, upon deferral thereto, proved to be inadequate in providing the comprehensive remedy contained in the federal anti employment discrimination Act. Its purpose "to effect that result is clearly manifested." *Reid* v. *State of Colorado,* 187 U.S. 137, 148, 23 S.Ct. 92, 47 L.Ed. 108 (1902), cited in *Schwartz* v. *State of Texas, supra* at 344 U.S. 203.

It is submitted that independent compliance with both state law and federal law is not an impossibility. *Florida Avocado Growers* v. *Paul, supra* at 373 U.S. 142-143. In fact compliance is quite feasible and totally reconcilable.

In light of the clear presence of federal power in the instant case, the question herein ". . . is not one of authority to act, but of its appropriate exercise." *State of Florida* v. *United States, supra* at 282 U.S. 211-212. Although Congress has not explicitly and specifically so ordained,[10] the reasons are persuasive that the exercise herein was appropriate and contemplated, *Florida Avocado Growers* v. *Paul, supra* at 373 U.S. 142, envincing the ". . . general intent to accord parallel or overlapping remedies against discrimination." *Alexander* v. *Gardner-Denver Co., supra* at 415 U.S. 47.

[10] While preemption is authorized under Title XI of the Civil Rights Act of 1964 where conflict or inconsistency with state law is manifest, Congress did not spell out preemption in the context of the attorney's fees provision under Title VII. While not conceding that the award of fees by a federal court is preemptive (where a state forum does not provide the prevailing party with the same), if it is to be articulated in such terms, it is important to note that "while preemption by implication is not favored . . . there is no requirement that Congress identify the several categories of state law it wishes to preempt." *Prevel Industries* v. *State of Conn.,* 468 F.Supp. 490, 492 (D.C. Conn. 1978), *affirmed without opinion* 603 F.2d 214 (2nd Cir. 1979), citing *Florida Lime & Avocado Growers, Inc.* v. *Paul, supra* at 373 U.S. 132.

Finally, if the issue herein is appropriately framed in preemptive terms, Title XI of the Civil Rights Act of 1964 (42 U.S.C. Section 2000h-4) specifically authorizes the same where, as here, the deferral state legislation manifests an inconsistency with the purpose of Title VII or any provisions therein.

Title XI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000h-4, provides:

> "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."

While the statutory scheme as a whole does not envision preemption, Congress has provided that, where a provision of state law is in conflict with the enunciated purpose of Title VII or any provisions therein (by specific language or by omission), the federal law supersedes.

Such subsequent resort to the federal remedy does not mean that the federal forum has preempted the state rights, duties, obligations, mechanisms, and procedures in this respect. Rather it does exactly what it is designed by Congress to do, to wit: supplement the deferral state relief which, because of legislative omissions, is not fully consistent with the purpose of Title VII, as with the attorney's fee provision herein.

III. The Award of Attorney's Fees Is Envisioned as Part of the Full and Comprehensive Remedy in the Enforcement of the Congressional Policy to Eliminate Employment Discrimination.

Pursuant to the detailed scheme of enforcement enacted by Congress under Title VII, provision is made for a court to "allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . .", Section 706(k) Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5(k).

While Section 706(k) appears to leave the award of attorney's fees to the sound discretion of a District Court, it is nevertheless apparent from this Court's clear and convincing pronouncements that "under Section 706(k) of Title VII a prevailing plaintiff . . . is to be awarded attorney's fees in all but special circumstances." *Christiansburg Garment Co.* v. *EEOC,* 434 U.S. 412, 417, 98 S.Ct. 694, 54 L.Ed. 2d 648 (1978). See also: *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed. 2d 1263 (1968); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 450, 415, 98 S.Ct. 2362, 45 L.Ed. 2d 280 (1975).[11] Among other of the strong equitable considerations "counseling an attorney's fee award to a prevailing Title VII" complainant, *Christiansburg Garment Co.* v. *EEOC, supra* at 434 U.S. 418, is this Court's recognized concept that a private litigant "is the chosen instrument of Congress to vindicate 'a policy considered of the highest priority.' " *Christiansburg Garment*

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[11] In *Newman, supra* at 390 U.S. 410-402, this Court "found that an identical attorney's fees provision in Title II of the 1964 Civil Rights Act was intended to 'encourage individuals injured by racial discrimination to seek judicial relief' ", *Grubbs v. Butz,* 548 F.2d 973, 975, footnote 11 (D.C. Cir. 1976), casting a Title II grievant "in the role of 'a private attorney general, vindicating a policy that Congress considered of the highest priority' ", *Christiansburg Garment Co.* v. *EEOC, supra* at 434 U.S. 416, citing *Newman* v. *Piggie Park Enterprises, supra* at 390 U.S. 402. The *Piggie Park* rationale was held by this Court to be applicable to Title VII matters in *Albemarle Paper Co.* v. *Moody, supra* at 422 U.S. 415.

Co. v. *EEOC, supra* at 434 U.S. 418, citing *Newman* v. *Piggie Park Enterprises, supra* at 390 U.S. 402.

As noted by the Circuit Court below, the approach adopted by this Court in *Christiansburg, supra,*

> "stems from a recognition that it is in the public interest to aid Title VII enforcement through private actions, and a liberal reading of the attorney's fees provisions encourages this effort." Appendix at page A6.

At least one commentator has noted that the inclusion of the attorney's fees provision by Congress in the Title was the result " . . . of the Senate's effort to shift primary responsibility for enforcing Title VII from the EEOC to aggrieved individuals." *Grubbs* v. *Butz, supra* at 548 F.2d 975, citing Vaas, Title VII: Legislative History, 7 B.C. Ind. & Com. L. Rev. 431, 435 (1966).

By the mandated procedural deferral in this matter, the EEOC, through the efforts of the Respondent, did "effectuate the congressional policy against . . . discrimination", *Johnson* v. *Georgia Highway Express,* 488 F.2d 714, 716 (5th Cir. 1974), as encompassed in Title VII of the Civil Rights Act of 1964.

Thus, the Respondent is entitled to attorney's fees which, themselves, are designed to further the purposes of the Act. *Newman* v. *Piggie Park Enterprises, supra* at 390 U.S. 400. See also: *Albemarle Paper Co.* v. *Moody, supra* at 422 U.S. 405; *Lea* v. *Cone,* 438 F.2d 86 (4th Cir. 1971; *Evans* v. *Sheraton Park Hotel,* 503 F.2d 177 (D.C. Cir. 1974); *Parker* v. *Califano,* 561 F.2d 320 (D.C. Cir. 1977); *Johnson* v. *Georgia Highway Express, Inc., supra* at 488 F.2d 714; *Rios* v. *Enterprise Association Steamfitters Local 638 of U.A.,* 400 F.Supp. 993 (S.D.N.Y. 1975), *affirmed* 542 F.2d 579, 592-593 (2nd Cir. 1976), *cert. denied* 430 U.S. 911, 97 S.Ct. 1186, 51 L.Ed. 2d 588 (1977); *August* v. *Delta Airlines,*

Inc., 600 F.2d 699, 701 (7th Cir. 1979); *Mid-Hudson Legal Services, Inc.* v. *G & U, Inc.,* 578 F.2d 34, 37 (2nd Cir. 1978); *Davis* v. *Murphy,* 587 F.2d 362, 364 (7th Cir. 1978) (under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. Section 1988); Nussbaum, *Attorney's Fees in Public Interest Litigation,* 48 N.Y.U.L.Rev. 301, 321-322 (1973).

It is submitted that, to deny a deferral Plaintiff the right to attorney's fees, when that Plaintiff has prevailed in a state forum which does not authorize the award of the same, but to permit a prevailing party the right to fees in a nondeferral state, would raise serious equal protection problems and would create a fundamental inconsistency in the comprehensive federal anti-discrimination legislation, which Congress obviously did not intend.

Even more incongruous would be the result of awarding an unsuccessful state litigant attorney's fees after seeking resort to a federal forum and prevailing therein, upon receipt of a Notice of Right to Sue, but denying the successful state litigant access thereto solely because of a success.

Under the circumstances of this litigation, it cannot be disputed that the Respondent was a "prevailing party." See: *Gagne* v. *Maher,* 594 F.2d 336, 339-341 (2nd Cir. 1979), *appeal pending* and cases *cited* therein (discussing "prevailing party"). See also: *Kopet* v. *Esquire Realty Company,* 523 F.2d 1005, 1008-1009 (2nd Cir. 1975). Thus, when the state position was finalized in the Respondent's favor, the only matter addressed by the District Court below was the issue of fees.

The Plaintiff filed a complaint in the federal District Court, seeking full and complete relief under Title VII, including a prayer for reinstatement, back pay, and attorney's fees. Notwithstanding that the Petitioners could have requested a de novo hearing before the District Court on the issue of liability and appropriate relief, they declined

to do so, apparently conceding the liability issue. *Batiste* v. *Furnco Construction Corp.*, 503 F.2d 447, 451 (7th Cir. 1974), *cert. denied* 420 U.S. 928, 95 S.Ct. 1127, 43 L.Ed. 2d 399 (1975), where the Court held that "while a defendant can be required to defend again, it cannot be forced to accept prior findings". See also: *Chandler* v. *Roudebush*, 425 U.S. 840, 96 S.Ct. 1949, 48 L.Ed. 2d 416, 432, footnote 39 (1976) where this Court noted that, in the de novo proceedings, "it can be expected that, in light of the prior administrative proceedings, many potential issues can be eliminated by stipulation . . ." or otherwise. In accord: *Alexander* v. *Gardner-Denver Co., supra* at 415 U.S. 60.

The Respondent, having achieved an appropriate finding of liability under the New York State Human Rights Law[12] and relief by way of a backpay award and an offer of a position, merely sought to secure the more comprehensive relief encompassed under Title VII, i.e., attorney's fees.

In other words, to deny the Respondent the federal relief sought herein, would penalize her for successfully enforcing the Title VII anti-discrimination policy in the state forum to which she was mandatory deferred by the very Act. The Circuit Court below recognized this incongruity (Appendix at page A12) and rejected the inequity which was clearly not envisioned by Congress when it enacted Title VII as a unifying federal statutory anti-discrimination scheme.

In effect, the state action (inaction) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941), cited in *Bucyrus-Erie Co.* v. *Department of Industry, Labor, etc., supra* at 599 F.2d 207.

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[12] It should be noted that "the Human Rights Law is undoubtedly a function of the equal protection guaranty" as encompassed within the Fourteenth Amendment to the United States Constitution. *Board of Education of Union Free School District*, 345 N.Y.2d 93, 97 (2nd Cir. 1973).

In fact, the awareness that additional supplemental relief can be secured from the federal forum is an incentive to obtain voluntary compliance within the state forum, thus avoiding invocation of formal adjudicatory processes in both the state forum and the federal forum.

It is even reasonable to believe that, if the Petitioners had known that attorney's fees could ultimately be secured from and through the federal forum, conciliation in the state forum might have been secured, thereby effecting "the promotion of dispute resolution through accommodation rather than litigation." See: *Weise* v. *Syracuse University*, 522 F.2d 397, 412 (2nd Cir. 1975).[13]

Thus, while the awarding of fees herein "may appear somewhat at odds" with the "encouragement of private

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[13] The majority of the Circuit Court below found that the award of fees in circumstances at hand could discourage "needless litigation", Appendix at pages A-12-13, recognizing that "acts awarding fees should not be interpreted so as to 'encourage plaintiffs to try cases in which reasonable settlement offers have been received, merely to ensure a fee award.'" *Gagne* v. *Maher, supra* at 594 F.2d 340.

In the instant case conciliation and settlement were discussed but they were never reached because of the refusal on the part of the Petitioners to meaningfully engage in the process. Furthermore, even after the formal administrative process resulted in a ruling against the Petitioners, they refused to engage in further settlement discussion.

To the contrary, the Petitioners spent considerable time, effort, and, it is assumed, attorney's fees, seeking to overturn the administrative decisions and orders of those courts, although they apparently advanced no substantial legal or factual issue to justify a meaningful discussion, let alone a reversal, of the administrative decisions.

Thus, contrary to the dissenting opinion in the Court below (Appendix at pages A19, A21-22 and footnote 7 therein) that an award in the instant case would promote litigation, there is every reason to believe that an award of fees could promote meaningful informal resolution of the controversy and avoid meaningless litigation by both parties, particularly since this Court has sanctioned the award of fees against an unsuccessful Title VII plaintiff. See: *Christiansburg Garment Co.* v. *EEOC, supra* at 434 U.S. 412; *Kremer* v. *Chemical Construction Corp.*, 477 F. Supp. 587, 594 (S.D.N.Y. 1979).

settlement to avoid unnecessary litigation under Title VII", ". . . the two themes are reconciled in the context of their joint remedial purpose: devising a flexible network of remedies to guarantee equal employment opportunities." *Johnson* v. *Railway Express Agency, supra* at 421 U.S. 472 (Marshall, J., Douglas, J., Brennan, J., concurring in part and dissenting in part).

IV. Title VII Authorizes the Award of Fees for Success by an Aggrieved Party in an Administrative Proceeding.

While there appears to have been "scant attention . . . focused on the attorney's fee provision amid the sound and fury of the extended debates on the 1964 Civil Rights Act", *Grubbs* v. *Butz, supra* at 548 F.2d 975, thus making the legislative history of Section 706 (k) "sparse", *Christiansburg Garment Co.* v. *EEOC, supra* at 434 U.S. 420, nevertheless Circuit Judge Wright undertook a detailed analysis and examination of the legislative history and statutory framework of Title VII in *Parker* v. *Califano, supra* at 561 F.2d 320 and concluded that "a federal district court has authority to award attorney's fees that include compensation for work done in related administrative proceedings." Decision of the Circuit Court below, footnote 8, Appendix at page A9.

The *Parker* Court, relying on, among other authorities, *Newman* v. *Piggie Park Enterprises, supra* at 390 U.S. 400 and *Johnson* v. *Georgia Highway Express, Inc., supra* at 488 F.2d 716, held that the award of attorney's fees encourages the congressional policy designed to foster private enforcement of federal civil rights enactments and, ultimately, to secure broad compliance with the law.

In discussing the statutory language of Section 706(k), Judge Wright, quoting from *Johnson* v. *United States,* 12 EPD ¶ 11,039 at 4841 (B.O. Md. 1976), *affirmed,* 554 F.2d 632 (4th Cir. 1977), noted:

> "Had Congress wished to restrict an award of an attorney's fee to only suits filed in court, there would have been no need to add the words 'or proceeding' to any action. But proceeding is a broader term than 'action' and would include an administrative as well as judicial proceeding." *Parker* v. *Califano, supra* at 561 F.2d 331, cited by the Circuit Court below in footnote eight (8), Appendix at pages A9-A10.[14]

Viewing this Court's emphasis on the "interrelatedness of Title VII's administrative and judicial enforcement scheme in the private sector", *Parker, supra* at 561 F.2d 331, citing *Alexander* v. *Gardner-Denver Co., supra* at 415 U.S. 47, the *Parker* Court concluded "that in a Title VII suit brought by a federal employee, attorney's fees awarded under Section 706 (k) may include compensation for work done at both judicial and administrative levels", *Parker, supra* at 561 F.2d 324, and that, "for a conscientious lawyer representing a federal employee in a Title VII claim, work done at the administrative level is an integral part of the work necessary at the judicial level." *Parker, supra* at 561 F.2d 333. See also: *Canty* v. *Olivarez,* 452 F.Supp. 762, 769 (N.D. Ga. 1978), citing *Parker* v. *Califano* with approval in

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[14] Consistent with the view expressed by the *Parker* Court, it is the duty of a Court, ". . . when interpreting an act of Congress, to construe it in such a manner as to give effect to all its parts and to avoid a construction which would render a provision surplusage." *Wadsworth* v. *Whaland,* 562 F.2d 70, 78 (1st Cir. 1977), *cert. denied* 435 U.S. 980, 98 S.Ct. 1630, 56 L.Ed. 2d 72 (1978). That is, as this Court held: ". . . all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent." *McDonald* v. *Thompson,* 305 U.S. 263, 266, 59 S.Ct. 176, 178, 83 L.Ed. 1264 (1938), citing *Ginsberg & Sons* v. *Popkin,* 285 U.S. 204, 208, 52 S.Ct. 322, 76 L.Ed. 704 (1932); *Exparte Public Bank,* 278 U.S. 101, 104, 49 S.Ct. 43, 44, 73 L.Ed. 202 (1928). See also: *Wilderness Society* v. *Morton,* 479 F.2d 842, 856-857 (D.C. Cir. 1973), *cert. denied* 411 U.S. 917, 93 S.Ct. 1550, 36 L.Ed. 2d 309 (1973).

this regard (again in the context of a federal administrative process); *Smith* v. *Califano,* 446 F.Supp. 530, 531 (D.D.C. 1978), citing *Parker, supra* and *Williams* v. *Boorstin,* 451 F.Supp. 1117, 1125-1126 (D.D.C. 1978); *Patton* v. *Andrus,* 459 F.Supp. 1189 (D.D.C. 1978); *Fisher* v. *Boorstin,* 561 F.2d 340 (D.C. Cir. 1977); *Brown* v. *Batke,* 588 F.2d 634, 638 (8th Cir. 1978); *McMullen* v. *Warner,* 416 F.Supp. 1163, 1167 (D.D.C. 1976); *Fisher* v. *Adams,* 572 F.2d 406, 409 (1st Cir. 1978); *Whiteside* v. *Gill,* 580 F.2d 134, 140 (5th Cir. 1978).[15]

Inasmuch as "the Title VII enforcement scheme has included both administrative proceedings and judicial actions" from its inception, the denial of the fees awarded herein by the Court below would clash "sharply with the clearly perceived structure and aims of the Title." *Parker* v. *Califano, supra* at 561 F.2d 331. See also: *Brown* v. *Batke, supra* at 588 F.2d 636, affirming a District Court attorney's fees award, under the Attorney's Fees Civil Rights Act, for ". . . hours spent in proceedings before the Nebraska Equal Opportunity Commission and in Nebraska State Court, prior to the filing of the federal suit."

Thus, the reasoning of the majority below in these respects is "persuasive". *Marshall* v. *Communications Workers of America,* 21 EPD ¶ 12,719 (D.D.C. 1979), citing *Carey* v. *New York Gaslight Club, Inc., supra* at 598 F.2d 1253.

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[15] In a Freedom of Information Act litigation, where "administrative" efforts were undertaken to secure information but said information was not forthcoming until after a lawsuit had been instituted, it has been held that attorney's fees are proper. See: *Cuneo* v. *Rumsfeld,* 553 F.2d 1360 (D.C. Cir. 1977). See also: *Nationwide Bldg. Maintenance, Inc.* v. *Sampson,* 559 F.2d 704 (Court of Appeals, D.C. 1977); *Vermont Low Income Advocacy Council* v. *Usery,* 546 F.2d 509 (2nd Cir. 1976); *Jones* v. *U.S. Secret Service,* 81 F.R.D. 700 (D. D.C. 1979; *Marschner* v. *Department of State,* 470 F.Supp. (D.C. Conn. 1979).

V. The Private Representation of the Respondent in the Division Proceeding Was Authorized and Otherwise Necessary to Effect the Purposes of Title VII Thereby Justifying the Award of Fees Under the Act for the Efforts in Those Proceedings.

The Human Rights Law of the State of New York makes it clear that, at and during the Division proceedings, the Division attorney appears in support of the complaint (New York Executive Law, Section 297(4)(a)) rather than on behalf of the Complainant and, accordingly, represents the interest of the Division in the complaint.

The Petitioners advance the position that the distinction is one "without substance", Petitioners' Brief at page 12, and that the appearance by private counsel for the Respondent herein was superfluous at best. Such is hardly accurate and valid, as the majority in the Circuit Court below held. Appendix at pages A10-12 and at footnote 9 at pages A11-12.

Prior to 1964, when Title VII was enacted, the Executive Law of the State of New York did not permit a complainant to appear in a Division proceeding, by attorney or otherwise, unless the Division, in its discretion, granted the complainant an intervenor status. New York Session Laws, 1945, Chapter 118, Section 1.

Per a 1968 amendment to the law, the complainant was granted the right to appear, by counsel or otherwise, in a Division proceeding. New York Session Laws, 1968, Chapter 958, Section 6.

Thus it is apparent that the legislative history of the Human Rights Law of the State of New York was amended to promote the right of involvement of private counsel in a Division proceeding on behalf of a complainant. The Amendment, itself, acknowledged the significance of the right and emphasized the position of a private counsel in the Division proceedings. It is not inconsequential, moreover, that the Amendment, granting said right, was enacted subsequent to the passage of Title VII.

Significantly, at the investigative stage of the Division proceedings (after a complaint has been filed with the Division but before any sort of determination is made), the Division attorney plays no role whatsoever. Amicus Brief, Appendix C herein at pages c5-c6. See also: Rules of Practice of the New York State Division of Human Rights, 9 N.Y.C.R.R. Section 465.11.

Such is important since, at that stage, it is determined whether probable cause exists to go forward to a plenary hearing or whether the matter will be resolved in the form of a summary judgment type disposition. See: *Mitchell* v. *National Broadcasting Company,* 553 F.2d 265, 270-271 (2nd Cir. 1977).

In the instant case, the Respondent's attorney appeared with her at the initial investigatory proceedings and without a Division attorney present; and requested that certain information be produced. Subsequently, a probable cause finding was issued.[16]

To the extent that an investigatory conference was held in this manner, such was the only preliminary involvement by the Division in this effort. The posture of the Division employee at the investigatory conference was neutral rather than in an affirmative posture on behalf of the Respondent.

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[16] Significantly, approximately three years prior to that date, the Respondent, *pro se,* sought relief against the same Petitioners for discrimination (based on *sex*—as she charged); and a no probable cause finding was made. Thus, there is evidence that the presence of Respondent's counsel at the initial phase of this proceeding was very important, if not critical.

The position of dissenting Circuit Judge Mulligan below that "a Division investigator was assigned here and a finding of probable cause made", Appendix at pages A19-A20, and that "there was no suggestion by Carey [Respondent] of any inadequacy in the Division's handling of the investigation", Appendix at page A20, misses the point and totally misunderstands the reality of the investigative effort, by the Division herein. There was none.

Moreover, the Division attorney's representation on behalf of a complainant is otherwise significantly limited.

In a proceeding where the complainant does not prevail (by Commissioner's decision and order), the Division attorney cannot appeal the adverse decision, upon the complaint and for the complainant, because such would be inconsistent with the finding of the Commissioner whom the Division attorney, in fact, represents. Affidavit of Adele Graham, Appendix at page A61.

In addition, where the complainant secures only partial relief, upon prevailing, and seeks further relief in an appeal, the Division attorney will not represent the complainant in said effort since to do so would be inconsistent with the position of the Division, which said attorney represents on any appeal. Affidavit of Adele Graham, Appendix at page A61. See also *Matter of Mize* v. *State Division of Human Rights,**—— A.D.2d ——, 359 N.Y.S.2d 241 (2nd Dept. 1974).

Furthermore, where a party prevails before the Commissioner and an appeal is prosecuted by the non-prevailing party to the Appeal Board and the decision is reversed by the Appeal Board (against the complainant and the Commissioner), the Division attorney (who would appear before the Appeal Board to justify the decision of the Commissioner, upon the Complaint of the charging party) would not and cannot appeal the decision of the Appeal Board to the courts of the State of New York. *State Division of Human Rights* v. *State Human Rights Appeal Board,* —— A.D.2d —— (4th Dept. 1978), *leave to appeal denied,* 46 N.Y.2d 705 (1978).

It is apparent then that the New York State Division of Human Rights attorney, while ostensibly representing the complainant in a Division proceeding, in fact represents the Division itself upon the complaint, and not the complainant himself/herself. Affidavit of Adele Graham, Appendix at pages A59-A61. Therefore, the distinction as between the

"complainant" and the "complaint" has substantial and significant ramifications.

It is acknowledged herein that Respondent's counsel participated in all of the proceedings, that "the Division attorney did not appear at all during the extensive two day trial at which the complete record was made," and that "the entire burden of placing evidence in the record, and arguing the significance thereof, was borne by the attorney for the plaintiff." Affidavit of Adele Graham, Division Attorney, Appendix at page A59. See also: Amicus Brief, Appendix 6 herein at pages c3, c5.[17]

[17] Notwithstanding the Petitioners' position to the contrary, it is inconsequential for attorney's fees purposes that the Respondent's "private counsel" was an employee of a public interest organization. See: Footnote 1 of the Decision of the Circuit Court below (Appendix at pages A3-A4); *Reynolds* v. *Coomey*, 567 F.2d 1166, 1167 (1st Cir. 1978); *Rios* v. *Enterprise Association Steamfitters Local 638 of U.A.*, *supra* at 400 F.Supp. 996; *Mid Hudson Legal Services, Inc.* v. *G & U., Inc.*, *supra* at 578 F.2d 34; *Perez* v. *Rodriguez Bou*, 575 F.2d 21, 24 (1st Cir. 1978); *Rodriguez* v. *Taylor*, 569 F.2d 1231, 1245 (3rd Cir. 1977); *Palmigiano* v. *Garrahy*, 466 F.Supp. 732, 736 (D. R.I. 1979); *Fairly* v. *Patterson*, 493 F.2d 589, 606-607 (5th Cir. 1971). *Thompson* v. *Madison County Board of Education*, 496 F.2d 682, 689 (5th Cir. 1974); *Brandenburger* v. *Thompson*, 494 F.2d 885, 889 (9th Cir. 1974); *Gagne* v. *Maher*, *supra* at 594 F.2d 345; Awards of Attorney's Fees to Legal Aid Officers, 87 Harv. L.Rev. 411 (1973). At best, public interest status may affect the amount of an award; but it certainly does not foreclose an award totally.

To the extent that the Petitioners argue that the District Court's decision was predicated on an exercise of discretion rather than on the legal principle that it was without authority to award fees, Petitioners' Brief at page 10, such is ill based. In the first place, the argument made in this regard was not advanced by the Petitioners as an argument in support of their Petition. More significantly, it is abundantly clear from the District Court's analysis that, at the bottom line, it did not exercise its discretion to grant fees because it did not believe that it had the authority to do so. Subsequently, upon remand and after receiving direction from the Circuit Court below, the District Court did exercise its discretion and did award fees without delineating any specific reasons why said fees should not be awarded, as Courts have required as a predicate for the negative exercise of discretion in this respect. *Johnson* v. *Highway Express*, *supra* at 488 F.2d 714. In fact, the

As they did before the District and Circuit Courts below, so too herein:

> "Counsel for Gaslight has misstated . . . the obligation of the Division to provide representation to the complainant at any stage of the proceedings before it." Amicus Brief, Appendix C herein at page c6.

Likewise, both District Judge Werker and Circuit Judge Mulligan (dissenting):

> ". . . inadvertently overstated and misconstrued the Human Rights Law, the Division's Rules, and its actual practices." Amicus Brief, Appendix C herein at page c6.

See also: Decision of the Circuit Court below at footnote 9 (Appendix at pages A11-A12) where the Court addressed these propositions, in depth.

CONCLUSION

The judgment of the Circuit Court below should be affirmed in all respects.

Respectfully submitted,

CHARLES E. CARTER, ESQ.
GEORGE E. HAIRSTON, ESQ.
JAMES I. MEYERSON, ESQ.
1790 Broadway—10th Floor
New York, New York 10019
(212) 245-2100
Counsel for Respondent

By: .....

On the Brief:

JAMES I. MEYERSON, ESQ.

Court, in analyzing the fee application upon remand, found that "Plaintiff's attorney has satisfactorily documented the *necessity* and reasonableness" of the efforts undertaken and time expended. Emphasis added. Appendix E herein at pages E2-E3 (Order Upon Remand Awarding fees).

Appendices

APPENDIX "A"

Complaint

BEFORE THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NEW YORK REGIONAL OFFICE

CIDNI CAREY,

Petitioner

VS

THE GASLIGHT CLUB,

Respondent

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1. CIDNI CAREY is a Black woman who resides at 61-25 98th Street, Rego Park, Queens, New York 11374.

2. The GASLIGHT CLUB is believed to be a corporate entity authorized to do, and in fact doing, business in the State of New York. It is located at 124 East 56th Street, New York, New York.

3. On Monday, August 26, 1974, the Petitioner went to the Gaslight Club to apply for a job as a waitress.

4. The Gaslight Club is believed to be an exclusive membership club which provides food, beverage and entertainment for its members.

5. Prior to appearing at the Gaslight Club, the Petitioner called first to make sure that positions were open.

6. She spoke with an individual on the telephone and was asked several questions about herself. Thereafter, she was asked to come to the Club for an interview.

Appendix A

The Petitioner was interviewed by Mr. Ray Angelic, one of the Club managers, the other being Mr. John Anderson.

8. Both Mr. Anderson and Mr. Angelic are white and are still believed to be the managers of said Club.

9. The Petitioner was told that she had all of the qualification for the position but she was not given the job.

10. On the other hand, a white man who was applying for the same position was given the job.

11. It is believed that the Gaslight Club did not hire its first Black waitress until March, 1971.

12. It is believed that when the Petitioner applied for the position of waitress in August, 1974, the Gaslight Club did not have any Black waitresses in its employ; and it is believed that the same condition still exists.

13. It is believed that there are very few Black persons, male or female, employed by the Gaslight Club.

14. The Petitioner believes that she was discriminated against in employment opportunity by the Gaslight Club because she is a Black woman.

WHEREFORE, the Petitioner respectfully prays that the Equal Employment Opportunity Commission assume jurisdiction of this matter and make an appropirate determination after investigation of the Complaint.

Respectfully submitted,

/s/ CIDNI CAREY
Cidni Carey

Appendix A

AFFIDAVIT

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

CIDNI CAREY, being first duly sworn, deposes and says:

1. I am the Petitioner in the foregoing Complaint.

2. I have prepared the same with the assistance of James I. Meyerson, Esq., N.A.A.C.P., 1790 Broadway, New York, New York 10019, (212) 245-2100.

3. I believe the contents of the Complaint to be true except for things things stated upon information and belief and as to those things I believe them to be true.

Respectfully submitted,

/s/ CIDNI CAREY
Cidni Carey

Sworn to and subscribed before me
this 9th day of January, 1975.

/s/ MABEL D. SMITH
Notary Public

MABEL D. SMITH
Notary Public, State of New York
No. 31-4517944
Qualified in New York County
Commission Expires March 30, 1976

Appendix A

Determination

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Charge No. TNY 6-1075

Cidni Carey
61-25 98th Street
Rego Park, New York 11374

Charging Party

The New York Gaslight Club, Inc.
124 East 56th Street
New York, New York 10022

Respondent

DETERMINATION

Under the authority vested in me by Section 29 CFR 1601.19b(d) of the Commission's Procedural Regulations (September 27, 1972), I issue, on behalf of the Commission, the following Determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII of the Civil Rights Act of 1964, as amended, and the timeliness, deferral, and all other jurisdictional requirements have been met. The New York State Division of Human Rights found probable cause to believe that the New York State Human Rights law has been violated.

The Charging Party alleges that the Respondent discriminated against her by denying her employment because of her race, in violation of Title VII of the Civil Rights Act of 1964, as amended.

Appendix A

Having examined the entire record, including all relevant evidence, I conclude that there is reasonable cause to believe that Title VII of the Civil Rights Act of 1964, as amended, has been violated in the manner alleged. The evidence supports the charge.

Having determined that there is reasonable cause to believe that Respondent has engaged in unlawful employment practices, the Commission now invites the parties to join with it in a collective effort toward a just resolution of the matter. The parties may indicate their willingness to enter into settlement discussion by completing the enclosed invitation and returning it to this office in the self-addressed envelope within ten (10) days of receipt of this letter.

20 DEC 1976

.....

Date

Enclosure
Invitation to Participate in
Settlement Discussions

FOR THE COMMISSION

/s/ ARTHUR W. STERN
Arthur W. Stern
District Director

Appendix A

Invitation to Participate in Settlement Discussions

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Section 706(b) of Title VII, Civil Rights Act of 1964, as amended, requires that when the Commission determines there is a reasonable cause to believe the charge is true, it shall endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliations, and persuasion. This invitation is being issued to both parties to determine their willingness to engage in such settlement discussions. If either party declines discussion, or the Commission is unable to secure an acceptable settlement, the District Director shall inform both parties, in writing, of alternatives for obtaining relief available to the Charging Party(ies) and the Commission.

Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.

Date December 20, 1976 Charge Number TNY 6-1075

Please Complete the Following Information and Return to EEOC in Attached Self-Addressed Envelope

To:

Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Rm. 1301
New York, New York 10007

Appendix A

From:

(Name and address of charging party or respondent)

Cidni Carey
61-25 98th Street
Rego Park, New York 11374

I ☐ Will ☐ Will not Engage in Settlement Discussions.

Suggested

Date

Time

Location

Comments

Date

Typed Name of Charging Party/Respondent

Telephone Number Where Signee Can Be Reached

Signature

FORM
EEOC DEC 72 153

Appendix A

Invitation to Participate in Settlement Discussions

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

INVITATION TO PARTICIPATE IN SETTLEMENT DISCUSSIONS

Section 706(b) of Title VII, Civil Rights Act of 1964, as amended, requires that when the Commission determines there is a reasonable cause to believe the charge is true, it shall endeavor to eliminate the alleged unawful employment practice by informal methods of conference, conciliations, and persuasion. This invitation is being issued to both parties to determine their willingness to engage in such settlement discussions. If either party declines discussion, or the Commission is unable to secure an acceptable settlement, the District Director shall inform both parties, in writing, of alternatives for obtaining relief available to the Charging Party(ies) and the Commission.

Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.

Date December 20, 1976 Charge Number TNY 6-1075

Please Complete the Following Information and Return to EEOC in Attached Self-Addressed Envelope

To:

Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Rm. 1301
New York, New York 10007

Appendix A

From:

(Name and address of charging party or respondent)

Cidni Carey
61-25 98th Street
Rego Park, New York 11374

I ☒ Will ☐ Will not Engage in Settlement Discussions.

Suggested

Date

Time

Location

Comments

Date
12-29-76

Typed Name of Charging Party/Respondent
Cidni Carey

Telephone Number Where Signee Can Be Reached
212-271-8414

Signature
Cidni Carey

FORM
EEOC DEC 72 153

Appendix A

Right to Sue Letter

(July 13, 1977)

013367
JUL 25 REC'D

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

NEW YORK DISTRICT OFFICE
90 CHURCH STREET, ROOM 1301
NEW YORK, NEW YORK 10007
264-7161

JUL 13 1977

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ms. Cidni Carey
61-25 98th Street
Rego Park, New York 11374

Re: Carey v. New York Gaslight Club
Charge No. 021-76-1075

Dear Ms. Carey:

After due consideration, the Commission has decided not to litigate the above referenced matter. In view of this decision we are, hereby, enclosing a Conciliation Failure Notice of Right to Sue for you to commence legal action on your own.

It is imperative that you realize you have only 90 days within which to file in the proper federal district court.

Appendix A

It is advisable, however, that the services of an attorney experienced in such matters be obtained. If you have any problems in this regard, please contact me, (212) 264-7161, and I shall endeavor to find one for you.

If you have any question or need further assistant in this matter, please contact me.

Yours truly,

/s/ RALPH MUNOZ
Ralph Munoz
District Counsel

Enclosure:

As stated above.

Appendix A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CONCILIATION FAILURE
NOTICE OF RIGHT TO SUE

To:
Ms. Cidni Carey
61-25 98th Street
Rego Park, New York 11374

From:

Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

EEOC Representative
Ralph Munoz, District Counsel

Telephone Number
264-7167

Case/Charge Number
021-76-1075

The Commission has found reasonable cause to believe your charge of employment discrimination is true but has not entered into a conciliation agreement to which you would have been a party because attempts to achieve such a voluntary settlement with the respondent(s) have been unsuccessful.

The Commission has determined that it will not bring a civil action against the respondent(s) based on your charge and accordingly is issuing you this Notice of Right to Sue. The issuance of this Notice terminates the Commission's processing of your charge, except that the Commission

Appendix A

may seek status as intervenor if you decide to sue on your own behalf as decribed below.

If you want to pursue your charge further, you have the right to sue the respondent named in this case in the United States District Court for the area where you live.* IF YOU DECIDE TO SUE, YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

If you do not have a lawyer or are unable to obtain the services of a lawyer take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

You have a right to inspect and to copy information contained in the Commission's case file for use in a public court proceeding if you decide to sue. If you want to inspect this material, need help in filing your case in court, or have any questions about your legal rights, contact the EEOC representative named above.

An information copy of this Notice has been sent to the respondent(s) named in your case.

(Illegible Signature)
(Authorized EEOC Official)

cc: The New York Gaslight Club, Inc.
124 East 56th Street
New York, New York 10022

To: *(Respondent)*

*RESPONDENT IS LOCATED.

APPENDIX "B"

Affidavit of James I. Meyerson with Attachments

IN THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK
CIVIL No. 77 Civ 4794

JUDGE HENRY WERKER
MS. CIDNI CAREY,

Plaintiff

VS

NEW YORK GASLIGHT CLUB, INC., *et al.*

AFFIDAVIT

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

James I. Meyerson, being first duly sworn, deposes and says:

1. I am one of the attorneys for the Plaintiff herein; and I execute this Affidavit in that capacity.

2. I have been primarily (almost solely) responsible for all of the representation of the Plaintiff herein and through the state administrative and judicial proceedings that heretofore have transpired.

Appendix B

3. I assert the facts and information set forth herein based on facts, information, and belief which I have secured as a consequence of my representation of the Plaintiff in this proceeding and in all other proceedings attendant thereto.

4. On or about August 27, 1974, the Plaintiff, a Black American citizen, did seek a waitress position in and with the Defendant New York Gaslight Club, Inc. After auditioning and otherwise being interviewed, the Plaintiff was advised that there was no position available.

5. Believing that she was denied a position as a waitress in and with the Defendant New York Gaslight Club, Inc., because of her race and color, the Plaintiff did file a complaint with the New York District Office of the Equal Employment Opportunity Commission on or about January 9, 1975.

6. On January 24, 1975, the District Office of the Equal Employment Opportunity Commission did advise the Plaintiff's counsel that a complaint on behalf of the Plaintiff herein had been received by the office and accepted. A copy of said letter is attached hereto and made part hereof.

7. On January 28, 1975, the New York State Division of Human Rights did advise the Plaintiff that, pursuant to the provision of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000 (e)-5(c)), her complaint to the Equal Employment Opportunity Commission had been referred to said Division of Human Rights. It requested that the Plaintiff visit a particular office of the State Division within sixty (60) days for the purpose of filing a complaint

with said Division. A copy of said letter of advisement is attached hereto and made part hereof.

8. On February 21, 1975, the Plaintiff did file a verified complaint with the New York State Division of Human rights charging the Defendant New York Gaslight Club, Inc. and two of its employees (Ray Angelic and John Anderson, both of whom were in management positions) with discriminating against her by refusing to hire her because of her race and color (in substance the same charge which she brought against the New York Gaslight Club, Inc. and the two named individuals in the Equal Employment Opportunity Commission).

9. After investigation, the New York State Division of Human Rights found jurisdiction and probable cause to believe that the Defendants herein (as well as Ray Angelic who is not named herein) had engaged in an unlawful discriminatory practice.

10. Conciliation efforts failed and the case was recommended for public hearing (pursuant to the Rules and Regulations of the New York State Division of Human Rights).

11. On May 20, 1975, the Plaintiff's counsel did write to the New York District Office of the Equal Employment Opportunity Commission advising said Office that the Plaintiff herein was proceeding ahead in the State Division of Human Rights, per the referral and deferral by the Equal Employment Opportunity Commission to said State agency, and inquiring of the status of the matter before said Equal Employment Opportunity Commission. A copy of said letter is attached hereto and made part hereof.

12. On May 22, 1975, the New York District Office of the Equal Employment Opportunity Commission did respond to the foregoing letter and did indicate that, as soon as it was possible, an investigator would be assigned to the Plaintiff's matter and that she would be advised relative to the same. A copy of said letter is attached hereto and made part hereof.

13. From that correspondence, Plaintiff and her counsel assumed that there was an implicit advisement therein that the Equal Employment Opportunity Commission had reassumed jurisdiction of the matter and that dual jurisdiction existed.

14. Thereafter, upon due notice to all parties, the matter came on for hearing before the New York State Division of Human Rights, the Honorable Norman Mednick presiding as the duly appointed Hearing Examiner. Said proceedings commenced on September 22, 1975 and were continued to and concluded on January 15, 1976.

15. The Plaintiff herein was represented by James I. Meyerson, Esq., George E. Hairston, Esq., and Nathaniel R. Jones, Esq., all of whom represent the Plaintiff in the proceedings before this Court. James I. Meyerson, Esq., was almost solely responsible for the prosecution and preparation of the state administrative and judicial proceedings, on behalf of the Plaintiff herein; and he is solely responsible for the efforts before this Court.

16. The Defendants attorney herein also represented them as Respondents in the New York State Division of Human Rights and the subsequent administrative and judicial proceedings attendant thereto.

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17. On August 13, 1976, the New York State Division of Human Rights did issue an order relative to this matter. A copy of the same is attached hereto and made part hereof.

18. The Division found that the New York Gaslight Club, Inc. and John Anderson (named Defendants herein) had discriminated against the Plaintiff because of her race and color and in violation of the Human Rights Law of the State of New York. The Division also concluded that Ray Angelic had not discriminated against the Plaintiff and dismissed the Complaint as against him.

19. Relying upon the same, the New York State Division of Human Rights directed the New York Gaslight Club, Inc. to offer the Plaintiff a position as a waitress and to otherwise pay over to her a sum of money (computed according to a formula set forth in the Order) as a back pay award.

20. On or about August 20, 1976, the Defendant New York Gaslight Club, Inc. did file a Notice of Appeal from the afore-mentioned decision and Order to the New York State Human Rights Appeal Board, an agency independent of the New York State Division of Human Rights.

21. At the same time, the Defendant New York Gaslight Club, Inc. did seek a stay of the operation of the Division decision and Order from the aforementioned Appeal Board; and it did secure the same absolving it from implementing the relief, as set forth, pending the outcome of the appeal therein.

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22. On August 26, 1977, the New York State Human Rights Appeal Board affirmed the findings and determination of the Commissioner of the New York State Division of Human Rights. A copy of said decision is attached hereto and made part hereof.

23. Thereafter, the Defendant New York Gaslight Club, Inc. did file an appeal with the Supreme Court/Appellate Division—First Judicial Department seeking to have the administrative determinations overturned. A stay was secured temporarily absolving said Defendant from implementing the relief, as ordered; and an expedited appeal schedule was set.

24. On November 3, 1977, the Supreme Court/Appellate Division-First Judicial Department did unanimously affirm the administrative determination and the relief ordered therein and based thereon. A copy of said Order is attached hereto and made part hereof.

25. A subsequent Motion for reargument or in the alternative for leave to appeal to the Court of Appeals was denied by the Appellate Division. Said Order was entered by the Appellate Division on January 10, 1978. A copy of said Order is attached hereto and made part hereof.

26. On February 14, 1978, the Court of Appeals of the State of New York did refuse the Defendant New York Gaslight Club, Inc. leave to appeal thereto. A copy of said Order is attached hereto and made part hereof.

27. From May 22, 1975 (when Plaintiff's counsel received a correspondence from the District Office of the Equal

Employment Opportunity Commission in response to a previous inquiry relative to the status of the matter therein) until on or about November 12, 1976 (at which time the matter was pending before the Appeal Board, the New York State Division of Human Rights having determined, at that point, that the Defendant New York Gaslight Club, Inc. was liable to the Plaintiff for discriminating against her—per the Human Rights Law of the State of New York), when counsel for the Plaintiff and a representative of the New York District Office of the Equal Employment Opportunity Commission did speak over the telephone about the status of the proceedings in the State Division of Human Rights, there were no communications between the Plaintiff and the Commission regarding the matter.

28. Subsequent to November 12, 1976 (on or about November 13, 1976), Plaintiff's counsel did forward to the New York District Office of the Equal Employment Opportunity Commission copies of the briefs and memoranda submitted by the various parties to the proceedings to the New York State Human Rights Appeal Board. A copy of the cover correspondence relative thereto is attached hereto and made part hereof.

29. On July 13, 1977 (or thereabouts), the Plaintiff did receive a letter from the District Office of the Equal Employment Opportunity Commission (in New York) notifying her that the Commission had decided not to litigate her matter (having found probable cause) and enclosing herein a Notice of Right to Sue Letter. A copy of said correspondence and the attachment thereto are attached hereto and made part hereof.

30. Thereafter and within the mandated ninety (90) day period, the Plaintiff did file this federal action (pursuant to Title VII of the Civil Rights Act of 1964 as well as pursuant to the Civil Rights Act of 1866).

31. Plaintiff's counsel is unaware of any investigatory and/or conciliatory action taken by the Equal Employment Opportunity Commission in this matter once the matter was initially deferred and referred to the New York State Division of Human Rights, pursuant to 42 U.S.C. Section 2000 (e)-5(c), and notwithstanding that the Commission apparently reassumed jurisdiction over the matter subsequent thereto (per a legal obligation and responsibility to the Plaintiff herein).

32. Plaintiff never requested a Notice of Right to Sue Letter from the Equal Employment Opportunity Commission. In point of fact, Plaintiff never requested that the Equal Employment Opportunity Commission reassume jurisdiction over this matter pursuant to Title VII provisions and subsequent to the initial deferral and referral.

33. In point of fact, the Plaintiff elected to continue in the State Division of Human Rights pursuant to the deferral thereto by the Equal Employment Opportunity Commission and in view of the fact that the proceedings had commenced therein with reasonable dispatch (at least, initially), notwithstanding that the Plaintiff could have elected to request the Equal Employment Opportunity Commission to reassume jurisdiction sixty (60) days af-

ter the deferral and referral and, presumably, any time thereafter.

Respectfully submitted,

.....

JAMES I. MEYERSON, ESQ.
N.A.A.C.P.-1790 Broadway
New York, New York 10019
(212) 245-2100
Attorney for Plaintiff

By: /s/ JAMES I. MEYERSON

Sworn to and subscribed before me
this 14th day of April, 1978.
/s/ MABEL D. SMITH
Notary Public

My Commission Expires:

MABEL D. SMITH
Notary Public, State of New York
No. 31-4517944
Qualified in New York County
Commission Expires March 30, 1980

Letter Dated January 24, 1975

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE

90 Church Street, Room 1301
New York, New York 10007
264-7161

January 24, 1975

James I. Meyerson
Asst. General Counsel
NAACP Special Contribution Fund
1790 Broadway
New York, New York 10019

Re: Your letter of 1/9/75

Dear Sir:

We have received and accepted the charge of discrimination filed by Ms. Cidni Carey against The Gaslight Club.

We have sent her a letter of acknowledgement and a charge to fill out and return to us.

Sincerely,

/s/ FRANK PATTERSON
Frank Patterson
Supervisor Case Control

Appendix B

Letter dated January 28, 1975

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS
270 Broadway, New York, N.Y. 10007

January 28, 1975

Ms. Cidni Carey
61-25 98th Street
Rego Park, N.Y. 11374

RE: Your Complaint Against
Gaslight Club

Dear Ms. Carey,

A copy of your letter to the Equal Employment Opportunity Commission has been referred to our attention, in accordance with the provisions of the Civil Rights Act of 1964.

The New York State Human Rights Law confers jurisdiction upon this Division to receive and pass upon complaints alleging discrimination in employment because of age, race, creed, color, national origin or sex.

I am referring your correspondence to the attention of the following person and office:

Mr. C. Brown, Regional Dir. OR Mr. J. Lind, Regional Dir. 163 W. 125th St., N.Y., N.Y. 89-14 Sutphin Blvd., Jamaica, N.Y. 2nd floor.

You are invited to visit this office of the Division which is open Monday through Friday from 9 AM to 5 PM.

It is requested that you file a complaint with this Division within 60 days. If you do not respond to this com-

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munication within that period of time, the Equal Employment Opportunity Commission will be so notified.

Very truly yours,

/s/ SOL COHEN
Supervisor, Case Control Unit

SC/hm

CC: James I. Meyerson, Esq.
NAACP—Special Contribution Fund
1790 Broadway
New York, N.Y. 10019

Appendix B

Letter dated May 20, 1975

Mr. Frank Patterson
Supervisor Case Control
Equal Employment Opportunity Commission
New York District Office
90 Church Street
New York, New York 10007

Re: Carey vs Gaslight Club

Dear Mr. Patterson:

In January, 1975, a complaint encaptioned as above, was filed in your office and thereafter referred to the New York State Division of Human Rights.

The matter is proceeding ahead in the Division; but I am requesting that your office reassume jurisdiction herein so that, should it be necessary, we can obtain a Right to Sue letter at an appropriate time in the future.

I would appreciate confirmation of the same. Thank you for your consideration and attention herein.

Sincerely yours,

James I. Meyerson
Assistant General Counsel
ATTORNEY FOR COMPLAINANT
CIDNI CAREY

JIM:lm

cc: Ms. Cidni Carey

Appendix B

Letter dated May 22, 1975

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
90 CHURCH STREET, ROOM 1301
NEW YORK, NEW YORK 10007

May 22, 1975

NAACP Special Contribution Fund
1790 Broadway
New York, N.Y. 10019

Attn: James I. Meyerson Atty

Re: Your letter of 5/20/75
TNY 5-0458 Carey vs. Gas Light Club

Dear Sir:

This is in response to your recent inquiry on the status of your complaint which you sent to this agency.

As soon as we are able we will assign an investigator to your charge and the investigator will contact you to inform you that the investigation is under way.

Thank you for your trust and confidence, I remain.

Sincerely,

/s/ ARTHUR W. STERN
Arthur W. Stern
District Director

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Letter dated November 13, 1976

NAACP Special Contribution Fund
1790 Broadway / New York, N. Y. 10019 / 245-2100

November 13, 1976

Mr. Frank Patterson
Equal Employment Opportunity
Commission
New York District Office
90 Church Street
Room #1301
New York, New York 10007

Re: Carey vs Gaslight Club, etc., et al.

Dear Mr. Patterson:

Pursuant to our telephone conversation on Friday, November 12, 1976, please find enclosed herein copies of some briefs (memoranda) submitted in the above-captioned matter to the Appeal Board of the New York State Division of Human Rights.

Thank you for your attention and consideration herein.

Sincerely yours,

/s/ James I. Meyerson
James I. Meyerson
Attorney for Complainant

JIM/

enclosures

copy: Ms. Cidni Carey

Appendix B

Order of Appellate Division of Supreme Court dated November 3, 1977

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 3, 1977.

Present:

Hon. Theodore R. Kupferman,

Justice Presiding,

Hon. Samuel J. Silverman,
Hon. Myles J. Lane,
Hon. Arthur Markewich,

Justices.

1170

[M-3558; M-3559]

The New York Gaslight Club, Inc.,

Petitioner,

—against—

New York State Human Rights Appeal Board on the complaint of Cidni Carey and Cidni Carey,

Respondents.

The above-named petitioner having presented a petition to this Court praying for an order, pursuant to Section 298 of the Executive Law, reversing the determination of the State Human Rights Appeal Board dated August 26, 1977,

which affirmed an order of the State Division of Human Rights dated August 13, 1976,

And respondents State Division of Human Rights and Cidni Carey each having interposed an answer to said petition,

And respondent State Division of Human Rights having cross-petitioned for an order, pursuant to Section 298 of the Executive Law, enforcing the order of the State Division of Human Rights dated August 13, 1976, as affirmed by order of the State Human Rights Appeal Board dated August 26, 1977, and directing petitioner to comply therewith,

Now, upon reading and filing the notice of application, with proof of due service thereof, and the petition of The New York Gaslight Club, Inc., verified September 7, 1977, and the memoranda of Kane, Kessler, Proujansky, Preiss & Permutt, P.C., all read in support of the petition; the answer of the State Division of Human Rights, verified September 21, 1977, and the memorandum of Sara Toll East, the answer of Cidni Carey dated September 26, 1977, and the affidavit and memorandum of James I. Meyerson, all read in opposition to the petition; and the notice of cross-application, with proof of due service thereof, and the cross-petition of The State Division of Human Rights to enforce its order dated August 13, 1976; and after hearing Kane, Kessler, Proujansky, Preiss & Permutt, P.C. for the petition, Sara Toll East opposed to the petition and for the cross-petition, and Mr. James I. Meyerson opposed to the petition; and due deliberation having been had thereon,

It is unanimously ordered that the determination of the State Human Rights Appeals Board, dated August 26,

1977, be and the same hereby is confirmed, without costs and without disbursements; and the cross-petition of The State Division of Human Rights to direct petitioner to comply with its order be and the same hereby is granted, without costs and without disbursements.

ENTER:

JOSEPH J. LUCCHI
Clerk

Appendix B

Order of Appellate Division of Supreme Court dated January 10, 1978

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on January 10, 1978.

Present:

HON. THEODORE R. KUPFERMAN,

Justice Presiding,

HON. SAMUEL J. SILVERMAN
HON. MYLES J. LANE
HON. ARTHUR MARKEWICH,

Justices.

M-3932

THE NEW YORK GASLIGHT CLUB, INC.,

Petitioner,

—against—

NEW YORK STATE HUMAN RIGHTS APPEAL BOARD on the complaint of CIDNI CAREY and CIDNI CAREY,

Respondents.

The above named petitioner having moved for leave to reargue its petition seeking to review a determination of the respondent dated August 26, 1977, which determination was unanimously confirmed by order of this Court entered on November 3, 1977 or, in the alternative, for leave to

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appeal to the Court of Appeals and for a stay of all proceedings,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Albert N. Proujansky in support of said motion, and the affidavit of Sara Toll East and the statement of James I. Meyerson in opposition thereto, and after hearing Mr. Albert N. Proujansky for the motion, and Sara Toll East and Mr. James I. Meyerson opposed,

It is ordered that said motion be and the same is hereby denied in all respects with $20 costs.

ENTER:

JOSEPH J. LUCCHI
Clerk

Appendix B

Order of the New York State Court of Appeals dated February 14, 1978

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourteenth day of February A.D. 1978

Present,

HON. CHARLES D. BREITEL,

Chief Judge, presiding.

Mo. No. 118

In the Matter of

THE NEW YORK GASLIGHT CLUB, INC.,

Appellant,

vs.

NEW YORK STATE HUMAN RIGHTS APPEALS BOARD, on the Complaint of CIDNI CAREY, and CIDNI CAREY,

Respondents.

A motion for leave to appeal and for a stay to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

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ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

APPENDIX "C"

Brief, Amicus Curiae, New York State Division of Human Rights (In Circuit Court Below)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MS. CIDNI CAREY,

Plaintiff-Appellant,

VS.

NEW YORK GASLIGHT CLUB, INC., and JOHN ANDERSON, Manager of the New York Gaslight Club, Inc.,

Defendants-Appellees.

APPEAL FROM MEMORANDUM AND DECISION (AND SUBSEQUENT ORDER RELATIVE THERETO) OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT OF INTEREST

The New York State Division of Human Rights (hereinafter "the Division") is the nation's oldest fair employment practices commission. It was created in 1945 in exercise of the State's police power for the protection of the public welfare, health and peace of the people of the State of New York, and in fulfillment of the provisions of the Constitution of this State concerning civil rights.

The Division has developed procedures for carrying out its functions under the law, to eliminate unlawful discrimi-

natory practices. It is the argument of the Division that the District Court erroneously interpreted the Human Rights Law and the Division's procedures thereunder. The interest of the Division herein is that the Court has before it an accurate account of the law, the Division's rules, and the actual facts of practice, with which the parties to this action are not necessarily knowledgeable.

STATEMENT OF THE BACKGROUND IN THE STATE DIVISION OF HUMAN RIGHTS

In January 1975, Appellant (hereinafter Carey) filed a complaint with the Federal Equal Employment Opportunity Commission (hereinafter EEOC) charging Appellee New York Gaslight Club, Inc. (hereinafter Gaslight) with an unlawful employment practice. Pursuant to Section 706 of Title VII of the Civil Rights Act of 1964 and to a contract with the Division the EEOC deferred the charge to the Division. The Division proceeded to act upon the charge pursuant to Section 297 of the New York State Human Rights Law, N.Y. Executive Law Art. 15 (McKinney's Vol. 18), by investigation, finding and determination of probable cause, and public hearing. An order favorable to Carey was issued after hearing, which, upon appeal, HRL Sections 297-a and 298, was affirmed by the State Human Rights Appeal Board and the Appellate Division of the Supreme Court. *N.Y. Gaslight Club* v. *S.D.H.R.*, 59 A.D.2d 852 (1st Dept. 1977). Leave to appeal was denied by the New York Court of Appeals. 43 N.Y.2d 951 (1978). Counsel fees to Carey's attorney, who participated at all stages of the proceeding from investigation through final appeal, were not awarded. See *S.D.H.R.* v. *Gorton,* 32 A.D.2d 933 (2nd Dept. 1969); mot. to dis. app. den. 25 N.Y.2d 680 (1969).

Carey, having previously obtained a right to sue letter from the EEOC, then filed an action in the Southern District Court to recover counsel fees. This action was dismissed by Judge Werker, in a decision which discusses the State Human Rights Law.

ARGUMENT

I.

The Law, Rules, and Practice of the State Division of Human Rights Reveal a Fundamental Distinction Between the Roles of Private Counsel for the Complainants and the Role of the Division Attorney.

Section 297 of the Human Rights Law sets forth the procedure to be followed in processing a complaint under the law. Subdivision 1 provides for the filing of a complaint which may be filed by an individual "or his attorney-at-law." Subdivision 2 provides for the investigation of the complaint; subdivision 3 provides for conciliation, and subdivision 4 provides the procedures for public hearing. Section 297-a establishes the State Human Rights Appeal Board, which, in subdivision 6, has the power "to hear appeals by any party to any proceeding before the Division from all orders of the Commissioner***." Section 298 provides for judicial review and enforcement in the Appellate Division of the New York Supreme Court. These various sections contain references to the Division attorney only as follows:

> "The case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his attorney. With the consent of the division, the case in support of the complainant may be presented solely by his attorney." HRL § 297.4.a.
>
> "The Division may appear in court by one of its attorneys." HRL § 298.

The provision obviates appearance by the Attorney General of the State of New York on behalf of the Division. See N.Y. Executive Law, Section 63.

Section 295 of the Human Rights Law, listing the general powers and duties of the Division, includes in subdivision 5 thereof the power "[T]o adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of this article, and the policies and practice of the division in connection therewith."

Rules were duly promulgated pursuant to this power, and were duly filed with the New York Secretary of State for publication in the Official Compilation of Codes, Rules and Regulations of the State of New York, equivalent to the Code of Federal Regulations, and which has the force and effect of law. (9 N.Y.C.R.R. § 465 et seq.) volume A-1; CCH Employment Practice Guide § 26075, pp. 8910 et seq.

Rule 456.6 refers to the investigation of a complaint (pursuant to Section 297.2 of the Law) by "the Regional Director . . . with the assistance of staff." Conciliation under Rule 465.7 is also left to the Regional Director. Rule 465.11 covers representation by an attorney. Subdivisions (d) and (e) are pertinent herein and are attached hereto for the Court's convenience. These sections reveal that dual representation by the Division attorney and a private attorney representing the complainant is not contemplated except in the unusual case and at the Division's option.

This rule, a 1977 codification of an existing procedure, was designed for two purposes: (1) conservation of the Division attorneys' time in a period of exceptionally heavy case loads and backlogs and (2) clarification of the role of the Division attorney vis-a-vis the complainant. The rules, carrying out the statutory mandate, and the actual procedures of the Division, work in actual practice as follows:

When a complaint is filed and investigated, the Division attorney does not appear except upon a special request made by the Regional Director for the purpose of representing and advising the Regional Director.

The Division is, however, aware that private counsel frequently represent complainants during this stage leading to a finding of probable cause or dismissal for no probable cause. Section 297.2. The finding of probable cause after investigation is a necessary preliminary to the public hearing stage. However, at no time is a complainant represented by a Division attorney at the investigation level.*

At the hearing the Division attorney appears if the complainant has not retained private counsel; if the complainant has retained private counsel the Division attorney appears at the Division's option to protect the public interest.

At the appellate level, the Division attorney appears to support the Division's order and to seek enforcement thereof pursuant to § 298. Here, the Division attorney represents only the Commissioner and the Division. The Division attorneys *cannot* represent a complainant on appeal from an order of the Commissioner adverse to the complainant. Nor can the Division attorney represent a com-

* There is an exception to this procedure when the Division itself, pursuant to its authority under § 297.1, makes a complaint on its own motion. An attorney may be assigned to draft the complaint and to advise the regional staff in the investigation.

plainant whose favorable order after hearing has been reversed by the Appeal Board. Such a situation recently occurred in the case of *Cox* v. *Dept. of Correctional Services,* 61 A.D.2d 25 (4th Dist. 1978). The Division cannot appeal from an order of the State Human Rights Appeal Board. *SDHR* v. *Niagara Mohawk-Power Corp.,* —— A.D. 2d —— (4th Dept. 9-15-78) mot. for lv. to. app. den. —— N.Y.2d —— (N.Y.L.J. 12-4-78, P. 7 col. 2).

Counsel for Gaslight has misstated, in its brief at 21-23, the obligation of the Division to provide representation to the complainant at any stage of the proceedings before it. Likewise Judge Werker's holding that "The plaintiff had the option of pursuing her state administrative remedies without incurring any expenses at all for legal services" inadvertently overstated and misconstrued the Human Rights Law, the Division's Rules, and its actual practices.

II.

The Federal and State Agencies Function in an Integrated Scheme to Enforce the Public Policy of Combatting Discrimination.

The State Division of Human Rights is an official "706 Deferral Agency", under the provisions of the EEOC Rules and Regulations. 29 C.F.R. Part 1601, Section 1601.13. It stands in a contractual relationship with the Federal government under which moneys are received for the processing of those cases which fall within the jurisdiction of both agencies. Thus the State agency has a role, defined by Title CII of the Civil Rights Act of 1964 and refined by its contractual obligations, as seen in Exhibits A, B and C attached to the affidavit of Adele Graham accompanying the motion

for leave to file as amicus curiae, of a participant in an integrated Federal-State scheme.

Filing of a Division complaint is a condition precedent to filing a charge with the EEOC. The Division's jurisdiction is exclusive only for the first 60 days after the complaint is filed. Under the system called "dual filing," a complaint filed with the Division is deemed filed with the EEOC 60 days later, and a charge led with the EEOC is deemed filed with the Division immediately. The statement of Gaslight in its brief at p. 10 is therefore erroneous. At the time the Carey complaint was filed in 1975, the procedure was otherwise; that is, complaints were originally filed with the EEOC which then literally deferred them by notifying the State agency of the filing of the charge. The State agency was then required to notify the charging party of the necessity to come in to the State agency to file a complaint. Thus the 1975 contract (Ex. C) refers to the resolution by the State of "jointly filed charges" "consistent with an ongoing cooperative effort" and "an efficient division of work between said District office and the contractor."

Likewise the 1978 Worksharing Agreement (Ex. B) "in recognition of the common jurisdiction and goals", was intended to "integrate the charge processing procedures and reduce duplication of effort by sharing primary responsibility * * "(Ex. B p. 2).

Furthermore, the Memorandum of Understanding of June 8, 1976 (Ex. A) (an earlier version of the Worksharing Agreement) states:

> "In recognition of the common jurisdiction and goals of the two agencies and to provide an efficient procedure whereby individuals may invoke the full panoply of procedures and remedies available under the relevant

> state and federal laws, and Division and the Commission have endeavored to inform complainants/charging parties of their rights under both state and federal law, and have encouraged and assisted such individuals in filing with the other agency."

CONCLUSION

THE ROLE OF PRIVATE COUNSEL TO A COMPLAINANT UNDER THE HUMAN RIGHTS LAW IS DISTINGUISHABLE FROM THE ROLE OF AN ATTORNEY EMPLOYED BY THE STATE DIVISION OF HUMAN RIGHTS.

Respectfully submitted,

ANN THACHER ANDERSON
General Counsel
Attorney for Amicus Curiae
State Division of Human Rights

/s/ ADELE GRAHAM
By.....
ADELE GRAHAM
2 World Trade Center
New York, N.Y. 10047
(212) 488-5365

APPENDIX "D"

Answer of Petitioners in District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE

No. 77 CIV. 4794

MS. CIDNI CAREY,

Plaintiff,

—against—

NEW YORK GASLIGHT CLUB, INC. and JOHN ANDERSON,
Manager of the New York Gaslight Club, Inc.,

Defendants.

ANSWER

Defendant, New York Gaslight Club, Inc., in answer to the plaintiff's complaint, respectfully alleges:

1. Denies each and every allegation contained in the paragraphs of plaintiff's complaint designated as "5", "11", "16" and "18".

2. Denies knowledge or information sufficient to form a belief as to the allegations contained in the paragraphs of plaintiff's complaint designated as "6", "7", "8", "9" and "17".

As and for a First Affirmative Defense

3. That proceedings are pending for the same relief sought in this action in a proceeding in the Supreme Court of the State of New York.

Appendix D

As and for a Second Affirmative Defense

4. That the plaintiff was not hired by the defendant, the New York Gaslight Club, Inc. for reasons other than racial discrimination.

As and for a Third Affirmative Defense

5. That the plaintiff has not instituted this action within the time limit therefor, as required by the applicable statutes of the United States.

Dated: New York, New York
November 9, 1977

KANE, KESSLER, PROUJANSKY,
PREISS & PERMUTT, P.C.

By ALBERT N. PROUJANSKY
A Member of the Firm
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To:

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APPENDIX "E"

Order Upon Remand Awarding Fees

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 4794 (HFW)

MS. CIDNI CAREY,

Plaintiff,

—against—

NEW YORK GASLIGHT CLUB, INC., and JOHN ANDERSON, Manager of the New York Gaslight Club, Inc.,

Defendants.

APPEARANCES:

Attorney for Plaintiff:

CHARLES E. CARTER
GEORGE E. HAIRSTON
JAMES I. MEYERSON
N.A.A.C.P.
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New York, New York 10019

By: James I. Meyerson

Attorney for Defendant:

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680 Fifth Avenue
New York, New York 10019

By: Albert N. Proujansky

Appendix E

HENRY F. WERKER, D.J.

Plaintiff's attorney seeks an award of counsel fees in the amount of $10,700 representing 107 hours at $100 per hour.

In light of the attorney's experience in civil rights litigation, the proposed rate of $100 per hour is fair and reasonable.

With respect to the number of hours, however, 22 hours are attributable to the attorney's original application for fees, and 25 hours were devoted to the successful appeal of the Court's denial of that application. Although the second circuit has recently ruled that a district judge in his discretion may take into consideration time spent by a plaintiff's attorney establishing the right to an award of fees, *see Gagne* v. *Maher,* 594 F.2d 336, 343-44 (2d Cir. 1979), under the circumstances of this suit, *see generally Carey* v. *New York Gaslight Club, Inc.,* No. 78-7603, slip op. at 2547-56 (2d Cir. May 8, 1979) (Mulligan, J., dissenting), compensation for the time spent litigating the awarding of attorney's fees is unwarranted. Since these 47 hours were not devoted to vindicating the rights of the plaintiff but were spent solely for the benefit of her attorney, I am omitting them from the computation of the award. *Accord, Boe* v. *Collelo,* 447 F. Supp. 607, 610 (S.D. N.Y. 1978); *Kulkarni* v. *Nyquist,* 446 F. Supp. 1274, 1281 (N.D.N.Y. 1977).

The remaining 60 hours represent time spent by plaintiff's attorney drafting pleadings, memoranda and briefs, preparing and presenting evidence to the New York State Human Rights Division, meeting and communicating with counsel for defendant and the State Human Rights Division, and consulting with the plaintiff herself. Plaintiff's

attorney has satisfactorily documented the necessity and reasonableness of this amount of time. Accordingly, the application for attorney's fees is granted to the extent of $6,000 representing 60 hours at $100 per hour.

Submit orders on notice within 10 days after entry of this decision.

SO ORDERED.

Dated: New York, New York
August 3, 1979

/s/ HENRY F. WERKER
U.S.D.J.